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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 447

NICOLA MASSA,

Petitioner,

against

Ca. VENEZUELAN NAVIGACION,

Respondent.

MOTION AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES M. LEONARD,
Counsel for Respondent,
John W. McGrath Corporation,
Office & P. O. Address,
70 Pine Street,
Borough of Manhattan,
New York, New York 10005
269-3886

McHUGH & LEONARD,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

NICOLA MASSA,
Petitioner.
against
CA. VENEZUELAN NAVIGACION,
Respondent.

MOTION BY JOHN W. McGRATH CORPORATION FOR LEAVE TO FILE A BRIEF IN OPPOSITION TO THE INSTANT PETITION FOR CERTIORARI AND TO OTHERWISE PARTICIPATE FULLY HEREIN AND FOR AN AMENDMENT OF THE CAPTION OF THE INSTANT PETITION FOR CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

John W. McGrath Corporation, the movant herein, was impleaded as a third-party defendant by the defendant C. A. Venezuelan Navigacion (respondent herein) pursuant to Rule 14(a), F. R. C. P. Subsequently, the third party defendant, John W. McGrath Corporation, served both an answer to the third-party complaint and to the complaint of the plaintiff.

At all times thereafter the third party defendant, John W. McGrath Corporation, comported itself as a party ad-

verse to the Petitioner herein. The interests of the said third-party defendant, John W. McGrath Corporation, would be adversely affected were the instant petition to be granted.

Movant, John W. McGrath Corporation, has no knowledge as to why its name was omitted from the caption of the Petition herein.

Accordingly the third party defendant, John W. McGrath Corporation, moves this Court for leave to file the annexed brief and appendix in opposition to the Petition, for leave to participate herein to the same extent as if named as a respondent herein, and for an amendment of the caption of the Petition so as to include the third-party defendant as a respondent herein.

Respectfully submitted.

James M. Leonard,
Counsel for John W. McGrath Corporation.
70 Pine Street,
New York, New York 10005

New York, New York
September 29, 1964.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

NICOLA MASSA,
Petitioner,
against
C.A. VENEZUELAN NAVIGACION,
and
JOHN W. McGRATH CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT

Statement

The Petitioner herein, Nicola Massa, sustained injuries on February 24, 1955 while in the employ of John W. McGrath Corporation. McGrath, a stevedoring concern, had employed Massa as a longshoreman to work in connection with the loading of the S.S. CURAÇAO DE CUMANA (10a).*

There were two trials of this action. Upon the first trial the Petitioner's attorney restricted his claim to a single specification, one of unseaworthiness, viz. the claim

* Numeral references followed by the letter "a" are to pages in Petitioner's Appendix.

that the pallet upon which certain cartons of lube oil had been loaded was defective in that the slots or holes or apertures for the pallet bar plugs were too large (9a).

Upon the second trial, it was contended by the Petitioner's attorney that the pallet was unseaworthy because the wood comprising it was rotten, defective and broken and that the nails holding the pallet together were missing. These claimed defects, it was asserted by Petitioner's counsel, caused the pallet to come loose while it was being raised, thus precipitating some of the cargo on to the Petitioner, causing him injury (2 M. A., 3 M. A.).*

The second trial was tried to the court alone, a jury having been waived by counsel for Petitioner (9a). Subsequent to the trial the trial court made specific findings of fact (10a-13a). It was held by the trial court that the pallet in question was proper, safe, undamaged and in all respects seaworthy (13a). The trial court further found, based upon the testimony of supervisory employees of McGrath, that the cause of the accident was an improper insertion by Massa and a co-worker of the pallet plugs in the wrong pallet on one side of the operation (13a).

Upon the first trial the plaintiff relied on three fact witnesses to support his contentions. These were Nicola Massa (the Petitioner herein), Louis DiMeo and Frank Marrocolla. Testimony by all three on the first trial was vague in the extreme. The plaintiff himself gave no testimony with respect to any specific defective condition of the particular pallet in question. The only thing which the plaintiff said upon the first trial (and duly quoted in the petition at the top of page 5) was "Sometimes the hole is no good and then they slip out." Upon the second trial plaintiff did not testify and it was stipulated that if called he would testify as he had upon the first trial (Petition p. 3).

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* Numerical references followed by the letters "M. A." are to pages in McGrath's Appendix.

Louis DiMeo testified upon the second trial but his testimony contained nothing which could serve as the basis for a finding that the pallet in question was defective (1 M. A.-2 M. A.). The last of Petitioner's witnesses, Frank Marrocolla, however, testified that he observed the pallet to be rotten, defective, broken with loose boards and missing nails and in general in such a complete state of disrepair as to tax belief (2 M. A.-3 M. A.).

The testimony given by him upon the second trial was at complete variance with that which he gave upon the first trial (4a).

The findings of the trial court rejected the testimony of Frank Marrocolla and accepted the testimony of the supervisory employees of McGrath who examined the entire scene of the accident including the pallet in question.

The scene, as observed by the witnesses to which the trial court did give credit, showed the pallet plugs inserted into the top pallet of the group on one side, whereas the pallet plugs on the other side were inserted in the next to top pallet (6 M. A., 7 M. A., 11 M. A.). A portion of the cargo still remained loaded on the top pallet (7 M. A.). The cargo rigging was observed by McGrath's supervisory employees to be still draped over the top pallet (12 M. A.). In all, the testimony of the defense witnesses established conclusively that the top pallet was the pallet involved in the accident and that it was in proper, safe and seaworthy condition (10 M. A., 16 M. A.).

The findings of the trial court were thus based upon substantial, nay, incontrovertible, evidence.

POINT I

The contention of Petitioner that trial court was hoodwinked and that the trial court was bound to disregard the actual facts because of a supposed stipulation is nothing but "vain imaginings".

The argument adduced by Petitioner's counsel ignores the entire bulk of testimony which conclusively demonstrated that the top pallet as observed by McGrath's supervisory employees was the pallet in question and was in proper condition. Petitioner's argument runs:

A. The defense was bound by stipulation to the fact of there being four pallets originally at the scene of the accident.

B. The trial court should have been bound to the same stipulation.

C. The witnesses for the defense testified that the top pallet observed by them was one of a group of three pallets.

D. Ergo, the pallet observed by the defense witnesses was not the pallet involved in the accident.

Petitioner thus adopts the attitude that the Trial Court should have rejected all of the evidence which led it to accept the testimony of defense witnesses as credible, should have disregarded the factual contentions inexorably flowing from the unrebutted testimony of those defense witnesses, should have ignored the blatant self-contradictions, implausibilities and discrepancies of plaintiff's "star" witness, should have adopted a version of the accident completely inconsistent with the conceded physical facts, all for the sake of the ominous claimed inference purportedly raised by Petitioner's contention that a stipulation at a subsequent trial includes a stipulation at a former trial.

Petitioner contends that, upon the first trial, a stipulation was entered into with regard to various matters, including (avers Petitioner) the datum that there was a total of four pallets. The language of the colloquy assertedly constituting the "stipulation" of the first trial is set forth on page 11 of the petition. While it is open to sharp question whether the parties there reflected an intent to stipulate that there were, indeed, four pallets, the decision of the Court of Appeals prescinds from that question entirely.

A plain reading of the true stipulation entered into upon the *second* trial (set forth on page 3 of the petition) demonstrates that the parties entered into an agreement with respect to the prior testimony of Nicola Massa and the testimony of Nicola Massa alone.

> "... and that in lieu thereof we will offer in evidence the entire transcript of his testimony on the prior trial to be considered with the same force and effect *as if he had so testified in court on this trial.*" (emphasis supplied)

No one stipulated with respect to any testimony by Nicola Massa's *attorney*.

No one stipulated with respect to any claimed previous "stipulations" in the record of the first trial.

Later in the second trial, *after* the plaintiff's "star witness", Marrocolla had been confronted with the shattering contradictions between his testimony on the first and on the second trial, *after* the plaintiff had rested, and during the examination of a *defense* witness, Petitioner's counsel began to expound the theory that there was a phantom missing pallet.

When Petitioner's counsel began to voice objections based on the notion that it had been stipulated that there were four pallets and that the defense's witnesses were speaking of the top pallet of a pile of *three*, the trial court

specifically and unequivocally stated that there was no such agreement as to the numerical identity of the pallet involved in the accident.

> "Q. Now, this pallet that you reloaded with cartons, did you or did you not physically examine that pallet before it was reloaded with cargo?
> A. Yes, sir.
> Q. Tell us what parts of it you loaded——
> Mr. Rassner: Objected to as immaterial.
> The Court: Read that.
> (Record read)
> Mr. Rassner: We are making no claim that there was anything wrong with the third pallet. We do concede that the third pallet was used to reload and bring it up, and that it was good.
> The Court: No, you see what——
> Mr. Rassner: Objection withdrawn. We will use that in the argument.
> Mr. Giallorenzi: I don't understand these objections and long speeches and then they are withdrawn.
> The Court: You understand that if you had not withdrawn it, I was going to overrule it, and I want you to understand why.
> "You gentlemen don't agree on which was the $64,000 question pallet." (9 M. A.)

What is more, the Petitioner's attorney himself conceded the accuracy of the Court's statement:

> "Mr. Rassner: Right". (9 M. A.)

The Court of Appeals succinctly characterized this entire line of argument as "vain imaginings" (3a).

What Petitioner actually seeks herein is yet a third review of the facts. Such is not a function of a petition for certiorari.

As Mr. Chief Justice Hughes said:

> "Records are replete with testimony and evidence of facts. But the questions on certiorari are questions of law. So many cases turn on the facts, prin-

ciples of law not being in controversy. It is only when the facts are interwoven with the questions of law which we should review that the evidence must be examined and then only to the extent that it is necessary to decide the questions of law.

"This at once disposes of a vast number of factual controversies where the parties have been fully heard in the courts below and have no right to burden the Supreme Court with the dispute which interests no one but themselves."

Printed in SRep No. 711, 75th Congr., 1st Sess 40. Quoted by Mr. Justice Frankfurter in his dissenting opinion in *Dick* vs. *N. Y. Life Ins. Co.*, (q.v.) 359 U. S. 437, 447-463 at p. 455.

When, in an action at law, as here, a jury has been waived, an appellate court may not substitute its assessment of the facts for that of the trial court.

McCaughn v. *Real Estate Land Title and Trust Company et al.*, 297 U. S. 606.

The factual findings of the trial court are not subject to reversal on appeal unless "clearly erroneous".

Fed. Rules Civil Proc. § 52(a)
United States v. *Oregon State Medical Society*, 343 U. S. 326;
McAllister v. *U. S.*, 348 U. S. 19;
Guzman v. *Pichirilo*, 369 U. S. 698.

Far from being "clearly erroneous", the findings of the trial court were based on such substantial evidence that Petitioner's assertions as to the facts were dismissed as implausible and unworthy of belief.

POINT II

The affirmance by the Court of Appeals of the findings and conclusions of the District Court herein does not involve any conflict with prior decisions of this Court, or with decisions of other circuits, or with other decisions of the Second Circuit.

It is urged by Petitioner that the affirmance by the Court of Appeals for the Second Circuit herein brings that Court into conflict with prior decisions of this Court (Petition—Point I), into conflict with decisions of other circuits (Petition—Point II) and with previous decisions of the Court of Appeals for the Second Circuit (Petition—Point III).

McGrath submits that an analysis of the basis for the holding of the Second Circuit herein demonstrates no conflict with this Court, with other circuits or with prior holdings of the Second Circuit.

Upon the first trial of this matter, Petitioner's counsel specifically limited his claim to an assertion that the pallet in question was unseaworthy because of a claimed defective aperture.

Though, on the second trial, Petitioner enlarged the defects claimed with respect to the pallet the issues then litigated were limited to the pallet and the pallet only (9a).

At no time on either trial, did the Petitioner claim that the *method* of loading was improper (9a).

At no time was it suggested that the *method* employed during the operation in question was anything but within the strict mandates of safe, sound and prudent stevedoring technique.

At no time did the trial court find that the *method* of loading was improper or dangerous.

The explicit posture of this action at all stages, was that the method of loading was proper, customary and safe.

The trial court found that the cause of the accident was a *single, isolated, negligent act* by Petitioner and a co worker while engaged in a concededly proper *method* of loading (13a).

Had Massa, the Petitioner herein, inserted the plugs of the pallet bar he was handling into the proper slots there would have been no accident (13a).

Petitioner cites the decision of this Court in *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206 as being somehow in conflict with the result reached in the case at bar.

In *Gutierrez* the cargo bag there involved was ripped and torn, thus scattering beans dangerously about the work surface. This Court held that the *bean bag* was unfit and unseaworthy, hence liability was imposed on the shipowner.

> "Beans belong inside their containers, and anyone should know, as the trial court found, that serious injury may result if they get out of their containers and get underfoot. These bean bags were unfit and thus unseaworthy." (373 U. S. 206, 214)

In the case at bar all of the physical instrumentalities involved were found to be fit and proper to fulfill their intended function. McGrath submits there can be no meaningful relationship between the *Gutierrez* decision (which involved the classical defective condition peculiar to the unseaworthiness concept) and the instant case (which involved a single, isolated negligent act).

Again, Petitioner suggests that the decision of the Second Circuit in the instant case is in conflict with the deci

sions of the Third Circuit in *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 and *Thompson* v. *Calmar Steamship Corp.* 331 F. 2d 657. We do not feel that it is here necessary to discuss the correctness of these two decisions of the Third Circuit, (though the disposition by this Court of the petitions for certiorari in *Puddu* v. *Royal Netherlands S. S. Co.*, 2 Cir., 1962, 303 F. 2d 752 cert. denied 371 U. S. 840; and *Spinelli* v. *Isthmian S. S. Corp.*, 2 Cir., 326 F. 2d 870; petition for certiorari denied May 18, 1964, U. S. 12 L ed. 2d 298, rehearing denied June 26, 1964 U. S. 12 L ed. 2d 1058, would suggest that the rule adopted by the Second Circuit to the effect that a negligent method of operation is not to be equated with unseaworthiness is the correct one):

Presciding from that question entirely, McGrath submits that the facts of the instant case are clearly distinguishable from the factual structures underlying the *Ferrante* and *Thompson* cases.

Both *Ferrante* and *Thompson* imposed liability for unseaworthiness on a shipowner whose stevedore had undertaken a dangerous and negligent *method* of operation. Neither decision affected to deal with the occurrence of a single, spontaneous, isolated act of negligence in the midst of a method of operation which was safe and proper.

Thus, in *Ferrante*, it was the dangerous procedure of making two piles of plywood boards in a single slingload which caused the draft to fall. The Court castigated the "method of assembling two piles of plywood boards" side by side to make a slingload.

In *Thompson*, in spite of the availability of alternative methods of procedure the longshoremen elected to move a loaded freight car by battering it with three other cars. The Third Circuit held "that the method used to load the ship's cargo created an undue risk to those called upon to load it, making the vessel unseaworthy, and that the unseaworthiness was the cause of Thompson's injury." In arriving

at this conclusion the Third Circuit alluded to the dictum of this Court in *Morales* v. *City of Galveston*, 370 U. S. 165, 170 wherein it was said that unseaworthiness might "'arise'' from "The method of loading her cargo . . ."

Ferrante and *Thompson* and the cases cited therein share a common denominator. A continuous *method* of stevedoring operation was in existence which method was dangerous and unsafe.

In the instant case the *method* was concededly *proper*. The single act of negligence which caused the accident was the result of an improper execution of a proper and safe method. No decision has extended the law of unseaworthiness that far.

That a negligent act may create a subsisting condition which is unseaworthy, is of course, obvious; that is not at all the same thing as saying that the negligent act *is* the unseaworthiness. Thus, Petitioner's reference to *Gridlea* v. *U. S.*, 2 Cir., 232 F. 2d 919 is not in point. In *Gridlea* it was a subsisting dangerous condition and not an instantaneous act which was condemned.

Thus Petitioner has demonstrated no disharmony between the Circuits, or otherwise, relevant to the facts in this case. The instant Petition represents merely a last gasp effort to retrieve a case lost on the facts. The Supreme Court of the United States is an inappropriate forum for the attempt.

> "The question how the Court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit

Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Magnum Co. v. *Coty*, 262 U. S. 159, 163

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted.

JAMES M. LEONARD,
Counsel for Respondent,
John W. McGrath Corporation,
Office & P. O. Address,
70 Pine Street,
New York, New York 10005
269-3886

McHUGH & LEONARD,
Of Counsel.

APPENDIX

OF

JOHN W. McGRATH
CORPORATION

[96]* LOUIS DI MEO, called as a witness, having been first duly sworn, was examined as follows:

[220] *Re-direct examination by Mr. Rassner:*

[229] The Court: There is nothing in this record as to dimensions of any one pallet being any different from any other pallet.

Mr. Rassner: Well, I want to ask a question. Was this pallet any different than any of the other pallets you used?

The Court: How would he know?

Mr. Rassner: By looking at it.

The Court: Did you ever measure——

Mr. Rassner: I don't mean the size. I mean the physical condition, state of repair.

Mr. McKernan: I respectfully submit this is improper direct examination. There is not anything to that.

The Court: I don't think it is correct. You can call somebody on direct examination to testify as to condition, but you never went into this at all.

[234] The Court: Was there anything about this particular pallet that was different from any other pallet?

The Witness: I think it was in the holes, your Honor. These holes that's cut out where you put the prongs in.

[236] Mr. Rassner: If your Honor please, we appreciate the fact that you have exercised your Honor's discretion in permitting me to go back to direct testimony.

I have had a conference with associate counsel, and we have decided not to take advantage of your Honor's decision in our favor and to stop proceeding any further as to redirect.

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* Numerical references in brackets are to pages in the Transcript of Trial Testimony.

The Court: In other words, as to any questions of this witness concerning his opinion as to the state of repair of the pallet, is that right?

Mr. Rassner: Yes, sir.

* * *

[239] FRANK MARROCOLLA, called as a witness, having been first duly sworn, was examined and testified as follows:

* * *

Direct examination by Mr. Rassner:

* * *

[253] Q. Now, what about the wood in which the prongs had been inserted? A. The wood just turned a little bit, gave a little angle [254] (indicating) because the wood underneath wasn't nailed.

* * *

[266] Q. What happened to the pallet that had fallen? A. Repeat that?

Q. What happened to the pallet that had fallen? A. We put it on the side.

Q. Describe that pallet to his Honor after it had fallen. A. Well, after we sent this draft up, after we hooked up this draft, I went over and checked to see what was wrong with it.

The Court: Did you look at it?

The Witness: Yes, your Honor.

The Court: So, you examined, or you looked, at least, you looked?

The Witness: Yes.

The Court: At the pallet?

The Witness: Yes.

The Court: All right, what did you see?

[267] The Witness: I seen the holes. The wood on the side that the prongs on Nick Massa's side

was rotten and there was no nails underneath. The boards was loose underneath.

The Court: The wood was rotten, you say?

The Witness: Yes.

The Court: On the plaintiff's side?

The Witness: Yes.

The Court: How about the other side?

The Witness: It was fairly good.

The Court: Fairly good on the other side?

The Witness: Yes, sir.

The Court: What else?

What had no nails?

The Witness: The boards on the side of the board—the board underneath didn't have no nails.

The Court: Which boards had no nails?

The Witness: The boards underneath the pallet.

The Court: Underneath the pallet?

The Witness: Yes.

* * *

[272] Q. Can you describe the extent to which these boards on the pallet were rotten?

Describe it.

How far were they rotten? How much of an area was rotten? A. Well, as I said before, they were—there was no nails underneath the bottom and the holes were——

The Court: What about the side pieces?

[273] The Witness: They were rotten and underneath too, there was no nails on the boards underneath.

* * * *

[294] *Cross-examination by Mr. Giallorenzi:*

* * *

[306] Mr. Leonard: Your Honor, that has to be explained. There was a key question that has

not been called to the Court's attention which bears on whether or not the condition that this man has testified to actually existed. That is a question on page 92 of the record, direct examination by Mr. Rassner.

The Court: Of this witness?

Mr. Leonard: Yes, Frank Marrocolla, line 25, just after he had been asked whether or not he heard the testimony of Messrs. Massa and Di Meo, and he said that he had, and he was asked this question:

"Q. Is there any additional fact you know about or any different fact that you know about?"

And that answer was given: "A. No, sir."

[307] The Court: Well, of course, you haven't gone back far enough.

Start with line No. 10 and read down to line No. 25, because, I assume, you gentlemen are going to agree now that these questions at page 92 in the prior trial were asked from line 10 to line 3 of page 93?

Mr. Leonard: Starting at line 10, question by Mr. Rassner:

"Q. Mr. Marrocolla, were you one of the longshoremen working with Massa when he was injured?

"A. I was.

"Q. On February 24, 1955?

"A. Yes, sir.

"Q. Did you see him get hurt?

"A. Yes, sir.

"Q. Were you here throughout the entire testimony when Mr. Massa was on the witness stand?

"A. Yes, sir.

"Q. Were you here throughout the entire testimony of the previous witnesses?

"A. Yes, sir."

[308] The Court: Now, let us see who they were. Di Meo?

Mr. Leonard: And Massa.

The Court: And Massa.

Mr. Rassner: Those were the only two.

The Court: Go ahead.

Mr. Leonard: "Q. Could you hear everything they said?

"A. Yes, sir.

"Q. Is there any additional fact that you know about or any different fact that you know about?

"A. No, sir."

The Court: All right.

* * *

[310] The Court: No. That's quite all right. Now, is it a fact that the prior witnesses whom this man had heard had said nothing about a rotten pallet?

Mr. Rassner: We didn't go into that subject.

The Court: They had said nothing——

Mr. Rassner: The answer is yes to your Honor's question.

* * *

[489] JACQUES WAGEMAKER, called as a witness, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. McKernan:

[492] Q. Do you know what time the accident happened? A. I think it was around ten-thirty at night.

Q. How long after that did you get to the scene of the accident? A. I would say a very few minutes after.

Q. What did you see when you first got there? A. I saw a group of men standing about in a circle, and I went through the circle and noticed that Mr. Massa was laying

on the floor of the pier, and was already attended to by Mr. Lucas who was the terminal superintendent.

The Court: You said the floor of the pier. Do you mean lying on top of any pallets?

The Witness: No, sir. I meant to say that he was not on a skid.

The Court: All right. He was on the floor?

[493] The Witness: Yes.

The Court: Was he lying on his back or on his side, if you remember?

The Witness: I don't remember.

The Court: All right.

Q. Now, what else did you see? A. I asked Mr. Lucas whether Mr. Massa was attended to, and he said yes.

I then proceeded to the scene of the accident, which was at the skid of No. 4 hatch, after end.

I noticed cargo consisting of cartons, oil, in cans, strewn about in a rather disorderly manner.

Q. After you noticed the disorderly manner, did you come closer to the cargo? A. Yes, sir, I did.

I then noticed the particular pile of the pallet, the platform of the pallet that was in this disarray.

Upon closer investigation of it I noticed that the bar of the—the spreader bar with the tongs facing the forward end of the ship was in place in the top pallet; in other words, the tongs were inserted into the plugs of the top pallet. I walked around——

* * *

[495] Q. Describe the pallet that you saw. A. As I said before, it was a pile of pallets in disarray which the two top pallets were in disarray. The pallet facing the bar with tongs, and facing the forward end of the ship was inserted in the top pallet, and the [496] second bar facing the after end of the ship was inserted in the second pallet.

Mr. Rassner: I ask that the answer be stricken as not relating to the pallet in question.

The Court: We don't know yet what pallet it was.

I take his testimony to be that he saw a pallet?

Mr. Rassner: Yes.

The Court: That had the prongs inserted in the forward end, and I don't remember now what he said about the after end of it, the bar on the aft side or aft end, rather, where was that?

The Witness: The bar facing the after end of the ship was inserted in the second pallet, partially inserted, I should say.

Q. Did you see any pallet with any cargo on it at that time? A. The top pallet had some cargo on. A few cartons.

The Court: I don't quite get the picture yet: [497] These two pallets that you have referred to was one on top of the other?

The Witness: Yes, your Honor.

The Court: Did the sides line up with one another?

The Witness: No, your Honor.

The Court: They did not?

The Witness: No.

The Court: Did the top one overhang upon the pallet below it?

The Witness: They were kind of (indicating).

The Court: Criss-crossed?

The Witness: What we call cater-corner.

* * *

[504] Q. Just tell us what you did when you had the pallets hoisted up and down again. Tell us what you did and what happened. A. I got a couple of the men together and when the pile was straightened out, I had the pallet

which was hanging in the air lowered down on top of this pile and the bars with the plugs taken out.

And the whole bridle was thereupon hoisted in the air while it was clear above the men's heads. The few men that I got together thereupon proceeded to get these cartons of oil together and place them in an orderly fashion on the pallet ready to be hoisted into the ship.

The Court: That's the top one?

The Witness: The top one, your Honor. When that was done to my satisfaction, the bridle was lowered.

The bars with the plugs were reinserted in the top, in the proper place, and the draft was then taken away and loaded into the ship.

[505] Q. Well, where did the cargo come from that was loaded on this draft, this pallet? A. It was picked up again from what was laying on the dock.

Q. Now, outside of this pallet that was reloaded with the other pallets underneath it, was there any other pallet there at that location on the stringpiece? A. Not to my knowledge.

Q. Well, would you have seen it if there was?

Mr. Rassner: That's objected to.

A. I would have seen it, yes.

[508] Q. What efforts did you make, if any, to see or ascertain for yourself what was on the stringpiece? A. I walked around the pile. I looked over, carefully, where the cartons of oil are located; and in doing so, I did not find any other pallet in the neighborhood other than those that were visible on the pile underneath the hammer.

The Court: When you say the neighborhood, we know what a stringpiece is, but what is a neighborhood on a pier?

The Witness: I would say close to the working area, your Honor.

The Court: Do you mean by that over the entire stringpiece?

The Witness: That's right, that's exactly right. That would be six hundred feet long.

The Court: You looked over an area which you called a neighborhood of what dimensions?

The Witness: About twenty-five, thirty feet (indicating).

Q. Now, this pallet that you reloaded with cartons, did you or did you not physically examine that pallet be- [509] fore it was reloaded with cargo? A. Yes, sir.

Q. Tell us what parts of it you loaded——

Mr. Rassner: Objected to as immaterial.

The Court: Read that.

(Record read.)

Mr. Rassner: We are making no claim that there was anything wrong with the third pallet. We do concede that the third pallet was used to reload and bring it up, and that it was good.

The Court: No. You see what——

Mr. Rassner: Objection withdrawn. We will use that in the argument.

Mr. Giallorenzi: I don't understand these objections and long speeches and then they are withdrawn.

The Court: You understand that if you had not withdrawn it, I was going to overrule it, and I want you to understand why.

You gentlemen don't agree on which was the $64,000 question pallet.

Mr. Rassner: Right.

[511] The Court: You concede that that is the pallet, good in all respects, that was the pallet heretofore described by you as the rotten pallet?

Mr. Rassner: No, no, but I mean there is no point in describing this particular pallet.

The Court: But he says that this is it.

Mr. Rassner: All right.

If this were it, it was perfectly good. There was nothing wrong with it. If this was the pallet——

The Court: In other words, you are saying that the pallent that raised some of this cargo that was in disarray on the deck after the accident was in good condition?

Mr. Rassner: Of course.

* * * *

[514] The Court: Before it was reloaded?

The Witness: Yes, your Honor.

The Court: What was the extent of your look?

The Witness: That it was a perfectly good pallet.

The Court: No, no. What was the extent of your look?

How did you look at it?

The Witness: I walked around it.

The Court: All the way around it?

The Witness: Yes, sir.

The Court: What did you look at? What part of that pallet did you look at as you walked all the way around it?

The Witness: The top markings, since I cannot see the bottom, but the top marking or whether the notches were excessively large or excessively small.

The Court: Did you look to see what kind of wood it was, healthy looking wood, or rotten [515] wood?

The Witness: The wood was in A-1 shape, good shape.

* * *

[529] *Cross-examination by Mr. Giallorenzi:*

* * *

[531] By that, I mean, what was the position of the bridle and the tongs and the pallet bar and everything else you saw? A. The bridle was lowered, in a lowered position on the top pallet.

I also noticed that there was some cargo, as I stated before, on the top pallet, some few cartons.

The pile of pallet was in a disarray, and the top pallet facing in the forward end of the ship, that bar was fully inserted in the notches.

The bar facing the after end of the ship was partially inserted in the second pallet. The second pallet from the top.

Q. That was the very first thing that you saw when you reached the scene of the accident? A. Yes, after I left Mr. Massa.

The Court: Was there slack in the bridle?

The Witness: The bridle was completely lowered on top of the pallet.

Mr. McKernan: "On top of" what?

The Witness: On top of the pallet.

Mr. McKernan: On top of the cargo?

[532] The Court: On top of the pallet. The spreader then was down?

The Witness: Yes.

The Court: Down on the top pallet?

The Witness: Yes.

Mr. Giallorenzi: You just asked the question that I was going to ask.

The Court: I am sorry.

Mr. Giallorenzi: Thank you very much.

Q. Now, immediately below the spreader we see in this Exhibit No. 4 a number of, oh, I would say—well, would

you describe what we see, Mr. Wagemaker, from that? A. A number of ropes spliced into a net.

Q. What is the purpose of the ropes and the net? A. To hold the cargo in place while the draft is being hoisted or lowered.

Q. When you got to the scene of the accident and you saw the spreader on the top pallet with the cargo, did you also see those ropes? A. Yes, they were kind of draped (indicating). Over the pallet (indicating).

Q. Can you tell us how many cartons of case oil you saw on the uppermost pallet at the time that you first [533] arrived at the scene of the accident? A. I would say around, about a dozen.

Q. Can you tell us how many cartons of case oil were on the skid or the dock itself when you first arrived at the scene of the accident? A. After the draft was put together, put together again on the top pallet, I counted, if I am not mistaken, thirty-six cartons; therefore, there should have been laying about twenty-four cartons on the pier, partly on the skid.

Q. What was the purpose of counting these cartons? A. To ascertain what the weight of the draft was.

Q. Did any of these cartons fall into the water? A. No, sir.

[537] Q. Did any one of those men, Di Meo, Gambardella, or Marrocolla request a gear man? A. No, sir.

* * *

Cross-examination by Mr. Rassner:

[604] Q. Now, you didn't see the pallet fall, did you? A. No, sir.

Q. And when you got there, the pallet that you saw was the third one on other pallets, is that right? A. The third one on top of other pallets?

Q. There were two pallets, and the one that you saw was the third one? A. Yes.

Q. And that one was loaded with cargo when you got there? A. Yes, and the gear was resting on top of it.

[605] Q. The gear was on the bottom? A. No, on top of the pallet with the cargo, on top of it.

Q. Where, with relation to the top pallet, where were the bars, the two bars, the bridle? A. The bars facing the forward end of the ship was fully inserted at the top pallet.

The second bar facing the after end of the ship was partly inserted into the second pallet.

Q. Where was the bridle? A. The bridle was laying on top of the top pallet.

The Court: We know what a bridle is, it has been demonstrated before.

* * * *

[612] GEORGE JOHN PAUL LUCAS, called as a witness, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. McKernan:

[612] Q. Now, at the time of the accident, by whom were you employed? A. By the John W. McGrath Stevedoring Corporation.

Q. In what capacity? A. As terminal superintendent, piers 9, 10 and 11 on the North River.

Q. On the night in question, was your attention called [613] to an accident where Nicola Massa was injured? A. It was, sir.

Q. Did you go to see Massa? A. Yes, sir.

Q. About how far away were you on the pier from where this accident occurred at the time that you were advised? A. Approximately two hundred feet away.

Q. Did you go immediately to the scene of the accident? A. I did.

Q. You went to the scene of the accident.

George John Paul Lucas—Direct

Will you tell us what you saw there? A. I arrived at the scene of the accident. There were numerous amounts of longshoremen around. I went to Mr. Massa who was laying on the deck of the pier floor, immediately investigated his condition. Immediately covered him up, as the temperature was twenty degrees, and the wind blowing through the door and discovered that his leg was injured.

Q. This is inside the pier? A. Yes.

The Court: Now, he said that he was two [614] hundred feet from the scene of the accident?

Mr. McKernan: Yes.

The Court: And he went there immediately?

Mr. McKernan: Yes.

Q. Now, did you hear anything to suggest that there had been an accident, or, how did you learn that there was an accident? A. The minute that the accident happened, a longshoreman usually runs right to the head of the pier to call for an ambulance. This man informed me that there was an accident in No. 4 hatch——

The Court: I see.

The Witness: I arrived at the scene——

The Court: I see.

Plaintiff is on the deck of the pier?

The Witness: Yes, and we covered him up.

Q. Inside the pier? A. Inside the pier, approximately ten or twelve feet inside the door.

We then discovered that injury to his leg. At that time, I would say, five minutes later or so, a police car arrived with two officers to investigate the same acci- [615] dent, of Mr. Massa, which is the custom in the port that a police car will arrive, and they informed us that an ambulance was on the way.

We then took Mr. Massa with a hi-lo and pallet, placed him at it, and brought him up to the office.

Q. Do you recall who put him on the pallet? A. The longshoremen in the area.

We all assisted in picking him up as carefully as possible, and he arrived at the office.

* * *

[640] Q. Did you see any other pallet on the stringpiece except those three that you mentioned? A. No, sir.

The Court: Did you look around that area?

The Witness: If it had been there, I would have tripped over it.

The Court: The question was, did you look around?

The Witness: Yes, I did.

The Court: Was there a pallet resting up against the three pallets that you saw in an angle such as I am demonstrating by this piece of paper (indicating)?

The Witness: No, sir.

The Court: With one end resting on the pier and maybe a portion of the pallet resting against these three pallets, and the other end up in the air (indicating)?

The Witness: No.

The Court: Was there a pallet, a single pallet, laying on the pier in the area of the three pallets that you have told me about?

[641] The Witness: No, sir.

* * *

[644] Q. Did any of the longshoremen request that you remove any pallet, bring it to the hospital pile?

Mr. Rassner: Objected to as immaterial.

[645] The Court: I will allow it as having some possible bearing on the contention that the fallen pallet which has been so often described as

the rotten pallet, was not fit for use and made the place a dangerous place to work, and I will take it.

A. No, sir.

Q. When you first went to the stringpiece, you testified you noticed a pallet with certain cans of cartons of oil on it, is that correct? A. That's right.

Q. Did you examine the uppermost pallet, or the pallet on which the cans were resting? A. Did I personally examine the pallet?

Q. Yes. A. I glanced over the pallet after discussion with Captain Wagemaker.

Q. What did you observe about the uppermost pallet?

• • •

[646] A. There was nothing wrong with the pallet.

Mr. Rassner: Now, I object to that.

The Court: That's a conclusion.

Q. What was the condition of the pallet you say you glanced at, the uppermost pallet with the cartons on it?

Mr. Rassner: I object to the form.

The Court: "The condition" no, I will allow that.

A. This pallet contained cartons of oil.

Q. We know that. I want to know about the condition of the pallet? A. The pallet was as normal as any other pallet, the two pallets below it, or any pallet on the pier, and orders were given to reload the pallet.

There was nothing wrong with it. The decking was in fine shape. There was nothing wrong with the cargo stowed on it.

Q. How were the crosspieces? A. Nothing wrong with it.

Q. Did you see the one at the forward end and also the one at the aft end? A. Yes.

• • •

[65] WILLIAM F. WHEELER, called as a witness, having been first duly sworn, was examined, and testified as follows:

Direct examination by Mr. McKernan:

Q. Are you in business for yourself? A. Yes.

Q. What is the nature of that business? A. I am engaged in a marine consulting firm here in the Port of New York.

Q. What is the name of that firm? A. Byrne, Wheeler and Company.

Q. What qualifications have you for being—

Mr. Rassner: I concede the witness' qualifications.

The Court: Do you want the concession?

Mr. McKernan: I will accept it, yes.

The Court: All right.

• • •

[66] Q. Now, I show you plaintiff's Exhibit 8, plaintiff's Exhibit 5, which are two photographs, and ask you to assume that a pallet, similar to the pallet shown in the photographs was loaded with approximately 2,000 pounds of cargo, consisting of oil in cartons, and the pallet [66½] commenced to be raised with its cargo.

I ask you to tell me whether or not you have an opinion as to whether the plugs or tongs in that pallet, could come out?

The Court: You are not asking him to assume that the plugs were ever in, in your hypothetical question.

Mr. McKernan: Thank you, your Honor.

Q. Also assume, that the plugs were in as far as they could go in the pallets, and then I ask you whether or not, while the elevation of the cargo is taking place, whether

or not those plugs could come out on any of them? A. I have such an opinion, sir.

Q. Will you state it? A. Assuming that the pallet bars were properly and correctly inserted into the pallet, and that the load on the pallet was within the capacity of the winch lifting it, once the load and the pallet was suspended on the wire; the pallet bars could not become disengaged, barring of course, a catastrophic force, such as being struck by lightning or some other such force, but it would be practically impossible to disengage the bars from the pallet while the load was suspended.